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# NOTHING MUCH HAS HAPPENED, BUT LOOK WHAT'S COMING DOWN THE PIKE

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## RECENT DEVELOPMENTS IN NATURAL RESOURCES LAW

BY

THOMAS A. DAILY<sup>1</sup>

### CONTORTIONISTS HAMMER KAISER-FRANCIS BEFORE WESTERN OKLAHOMA JURY

Time was when you would rather be sued almost any place but Texas. That particular worm appears to have made a U-ey.<sup>2</sup> In today's Texas, no breach of contract, no matter how egregious, can be more than a breach of a contract.<sup>3</sup> There is no such thing as a contort<sup>4</sup> in Texas. Unfortunately, that may not be the case in Arkansas or Oklahoma.

During last year's Natural Resources Law Institute, we discussed the contort phenomenon in the context of *Seeco, Inc. v. Hales*.<sup>5</sup> Really, though, it didn't matter in *Hales* whether the class' theory was tort, contract or both. All damages awarded were

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<sup>3</sup> Actually, it took Texas some time to get to where it got. In *Pan American Pet. v. Hardy*, 370 S.W.2d 904 (Tex. Civ. App. - Waco 1963), the Texas Court of Appeals actually affirmed an award of punitive damages in an implied covenant to prevent drainage case. However, a more conservative Texas Supreme Court has since established that if the damage would not have occurred without the breach of some contract, the case could be brought only in contract. See *Dewitt County Electric Coop. v. Parks*, 1 S.W.3d 96 (Tex. 1999); *Southwestern Bell v. FDP Corp.*, 811 S.W.2d 572 (Tex. 1991); *Southwestern Bell v. Delanney*, 809 SW2d 493 (Tex. 1991); *Amoco Production Co. v. Alexander*, 622 S.W.2d 563 (Tex. 1981)

<sup>4</sup> When we use the word "contort" we mean a breach of contract, usually intentional, which a clever plaintiff's lawyer (the "contortionist") is able to convert into a tort (frequently fraud).

<sup>5</sup> 341 Ark. 673, 22 S.W.3d 157 (2000).

based upon actual underpayments of royalty, plus interest on those underpayments. Moreover, all of the *Hales* defendants were corporate affiliates of one another, proven to have been alter egos.

This year's leading contort case is *Bridenstine v. Kaiser-Francis Oil Company*.<sup>6</sup> The facts are complicated. Beginning in 1978, and continuing throughout the early 1980's, a company called Funk Exploration, Inc., drilled and operated numerous gas wells in Beaver and Texas Counties, Oklahoma. Those wells were connected to a gathering system built by a Funk affiliate, Funk Fuels Corporation. Another affiliate, Funk Liquids Corporation, built a gas plant to remove liquids from the gas. Almost from the beginning, Funk Exploration paid Funk Fuels a 45¢ per MCF gathering fee. In addition, Funk paid a "marketing fee" to a company called Encon. All these fees were deducted prior to payment of royalties by Funk.

By 1985 the Funk companies were in severe financial trouble. Whether for that reason or otherwise, they all changed their names during that year. Each became a Waterford Company.

Also, in order to raise cash, the Funk/Waterford entities sold a major position in the wells and the Beaver Pipeline to Ladd Petroleum Corporation. Over the years, through corporate changes, Ladd turned into Amax Oil & Gas, Inc., Union Pacific Oil & Gas Company, Universal Resources Corporation and, finally, various subsidiaries of Questar Corporation.

Meanwhile, Funk/Waterford took bankruptcy. Kaiser-Francis bought the

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<sup>6</sup> Texas County, Oklahoma, District Court Case No. CJ-2000-1.

Funk/Waterford entities out of the bankruptcy and merged them into Kaiser-Francis.

Throughout the 1980's and the 1990's, the producing companies, whatever their names, continued to deduct 45¢ per MCF for gathering, as well as a "marketing fee." At the end, Kaiser-Francis was paying that marketing fee to Texas Southwest Gas Corporation which, by then, had become a subsidiary of Kaiser-Francis. By the end of 1994, Kaiser-Francis had become the operator of most of the wells.

In 1995, the Bridenstines filed suit on behalf of themselves and a putative class of royalty owners against Kaiser-Francis, Union Pacific Oil & Gas Company, Universal Resources Company (Questar Exploration & Production Company) and Chase-Manhattan Bank (which had benefitted from the liquidation of the Funk/Waterford companies and the sale of their assets to Kaiser-Francis and the other defendants). All claims against all defendants other than Kaiser-Francis were settled by those defendants in 2000 and early 2001, leaving Kaiser-Francis as the remaining defendant at the trial.

The class alleged that Kaiser-Francis and the settling defendants were jointly and severally liable for non-payment of royalties on the gathering fees, the marketing fees, and for gas lost through under measurement. The class' theory was fraud.<sup>7</sup> It claimed that royalty check stubs and year-end statements "misrepresented" royalty owners' shares of the gas sale proceeds. The jury agreed. The verdict for actual damages against Kaiser-Francis is \$54,960,606.30. In addition, the jury awarded punitive damages of \$18,803,446.85. Kaiser-Francis will almost certainly appeal. However, as we learned from *Hales*, it is difficult to overturn a jury verdict.

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<sup>7</sup> A tort, or contort.

The contour aspect of *Bridenstine* is important for at least two reasons. First, and most obvious, is punitive damages. Punitive damages are not available in breach of contract actions. On the other hand, if an intentional tort is committed, the jury has the power to teach the defendant a lesson (and bestow a windfall upon the plaintiff) with punitive damages. \$18,803,446.85 is real money which would not have been awarded for mere breach of contract.

Second, since these damages were caused by the commission of a tort, Kaiser-Francis will be unable to obtain contribution from any of the other defendants, in spite of the fact that those defendants appear to have carried off much of the allegedly ill-gotten gain. Oklahoma's statute concerning contribution among joint tortfeasors provides for a reduction in liability to the extent of money paid by settling joint tortfeasors but, then, if those joint tortfeasors settled in good faith, they are released from any duty to contribute to the ultimate verdict.<sup>8</sup> This statute applies only to contribution between joint tortfeasors, since this legal justification for joint and several liability is based upon tort rather than contract principles.

Incidentally, the contribution issue would have turned out differently in Arkansas, which has adopted the Uniform Contribution Among Tortfeasors Act. Under the Uniform Act, a joint tortfeasor who settles is not discharged unless the release given him proportionately releases all other tortfeasors.<sup>9</sup>

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<sup>8</sup> 12 O.S. § 832(H).

<sup>9</sup> A.C.A. §§ 16-61-204 & 205.

**AOGC REGULATION ON SEISMIC ACTIVITY HAS UNINTENDED  
CONSEQUENCE IN COLUMBIA COUNTY CASE**

The 1993 Arkansas General Assembly enacted Act No. 242 of that year,<sup>10</sup> authorizing and directing the Arkansas Oil and Gas Commission (“AOGC” or “Commission”) to regulate seismic exploration activities. The Commission responded with Rule B-42. That rule provides, in part:

No entry shall be made by the permittee upon the lands upon which such seismic operations are to be conducted, without the permittee having first secured a permit from the landowner authorizing such operations to be conducted.

The regulation does not expressly deal with a situation where a landowner refuses to grant a permit despite the seismic operator’s contractual or common-law right of ingress and egress to the lands in question.

In 1998, Sonat Exploration Company wanted to conduct seismic operations in Columbia County on James Blanchard’s property. Sonat had lease rights to come on the land but Mr. Blanchard refused access. Sonat then obtained a restraining order against Mr. Blanchard so that it might exercise its lease rights.

Later, in the same consolidated case,<sup>11</sup> the Court<sup>12</sup> held that Sonat had trespassed upon Mr. Blanchard’s land and was liable therefor. The Court’s reasoning was that Sonat had violated Rule B-42 by not securing Mr. Blanchard’s permission and was thus a trespasser. The case has not been fully adjudicated and so no appeal has yet been taken.

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<sup>10</sup> A.C.A. § 15-71-114

<sup>11</sup> *Swift Energy Company and Blanchard, et. al. v. Sonat Exploration Company*, Columbia Circuit Case No. CIV 98-137-5.

<sup>12</sup> The Honorable Larry Chandler.

It is submitted that the AOGC has no authority to require landowner permission under circumstances where a seismic operator already has a legal right to come upon lands. As a consequence, Rule B-42, as interpreted by the *Blanchard* court, appears to be an unconstitutional taking of the seismic contractor's property rights. Moreover, the *Blanchard* result was never intended by the Commission.

The Commission staff has recently proposed a revision to Rule B-42. The offensive language would be changed to read:

No entry shall be made by the permittee upon the lands upon which such seismic operations are to be conducted without the permittee having first given notice as provided in Ark. Code Ann. (1987) § 15-72-203<sup>13</sup> to the surface owner of the lands upon which such operations are to be conducted.

Meanwhile, an appeal from the *Blanchard* ruling is a virtual certainty.

**HALES SAGA FINALLY ENDS AS THE ARKANSAS  
COURT OF APPEALS AFFIRMS DISMISSAL  
OF RATEPAYERS' CLAIM FOR REFUND**

This space, a year ago, began with a discussion of the infamous *Seeco v. Hales*.<sup>14</sup> As everyone knows, that case affirmed a record jury verdict in favor of a class of royalty owners who convinced the jury that they were defrauded when Seeco and its utility affiliate, Arkansas Western Gas Company, rewrote Contract 59<sup>15</sup> in order to appease the Arkansas Public Service Commission and implement a settlement entered into by Arkansas Western, the Commission staff and the Arkansas Attorney General's office.

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<sup>13</sup> A statute generally requiring notice to be given to the surface owners prior to oil and gas exploration.

<sup>14</sup> 341 Ark. 673, 22 S.W.3d 157 (2000).

<sup>15</sup> A gas purchase contract with ridiculously high prices and take-or-pay obligations.

*Brandon v. Arkansas Western Gas Company*<sup>16</sup> was a putative class action brought in the Public Service Commission, seeking to certify a class of all of AWG's rate payers and claiming entitlement to refunds for the period prior to the reduction in the Contract 59 gas price. Like *Hales*, *Brandon* involved multiple appeals. In a prior appeal,<sup>17</sup> the Court of Appeals held that the plaintiffs' attorneys were not entitled to attorneys' fees for representing the putative class under the common fund doctrine.<sup>18</sup>

After remand from that first appeal, the Public Service Commission dismissed Brandon and Brooks' complaint, holding that the settlement entered into by Arkansas Western, the Commission staff and the Attorney General's office<sup>19</sup> was a *res judicata* bar to further proceedings brought by individual rate payers. The Arkansas Court of Appeals affirmed and the *Hales* saga officially ended on February 7, when the Supreme Court denied the Plaintiffs' petition for review.

Perhaps the most remarkable thing about the *Brandon* opinion is that Judge Roaf, writing for the Court of Appeals, managed to never mention *Hales*. Actually, *Hales* is distinguishable. While the Attorney General clearly represents rate payers before the Public Service Commission, royalty owners are not parties and therefore principles of *res judicata* and collateral estoppel cannot apply to bar subsequent royalty owner cases.

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<sup>16</sup> 76 Ark. App. 201, 61 S.W.3d 193 (2001).

<sup>17</sup> *Brandon v. Arkansas Public Service Commission*, 67 Ark. App. 140, 992 S.W.2d 834 (1999).

<sup>18</sup> Remarkably, that was not the end of the matter.

<sup>19</sup> It was conceded that the Attorney General represented the State of Arkansas and all rate payers at that time.



**ARKANSAS COURT OF APPEALS AFFIRMS HOLDING  
AGAINST CO-TENANT'S CLAIM OF ADVERSE POSSESSION**

In the 1880's, Augustus and Martha Hopper acquired 120 acres of land in Yell County. After Martha's death, in 1947, one of their children, Lawrence Hopper, was in the sole possession of the lands until his own death in 1975. During that time, Lawrence exercised many incidents of ownership over the land, including possession, tax payments, receiving rents and profits, constructing and maintaining improvements and receiving the proceeds from oil and gas leases and timber sales. Lawrence's son, John Hopper, then possessed the land from 1979, when he retired from the Navy, until he discovered, in 1996, that record title was in his grandparents. He filed suit to quiet title against the rest of the family.

The Yell County Chancery Court<sup>20</sup> held that Hopper had not sustained his burden of proving that his possession was adverse to his co-tenants and granted the other family members' counterclaim for partition of the property. The Arkansas Court of Appeals affirmed.<sup>21</sup> The lesson here is simple. While it is possible for a co-tenant to adversely possess property, mere possession and exercise of incidents of ownership is not enough. There must be something which clearly telegraphs the adversity of the possessing co-tenant's intent to oust the rest of the family.

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<sup>20</sup> Honorable Van B. Taylor.

<sup>21</sup> *Hopper v. Daniel*, 72 Ark. App. 344, 38 S.W.3d 370 (2001).

**OKLAHOMA COURT OF CIVIL APPEALS RULES THAT RECEIPT OF ROYALTIES FROM A UNIT WELL DOES NOT CONSTITUTE ADVERSE POSSESSION OF MINERALS UNDER ANY TRACT OTHER THAN THAT UPON WHICH THE UNIT WELL IS PHYSICALLY LOCATED.**

As Professor Phillip Norvell taught us in a paper presented to this Institute in 2000,<sup>22</sup> there are a lot of cases which tell what is not adverse possession of severed mineral interests. Unfortunately, there are few, if any, holding what **is**. That said, many of us would have guessed that receipt of royalties from a unit well for a period in excess of seven years would constitute adverse possession of at least that class of mineral upon which the royalties were paid. The Oklahoma Court of Civil Appeals does not agree. In *Cornelius v. Moody Bible Institute of Chicago*,<sup>23</sup> that court held that since the unit well was not physically located on the tract in question, receipt of royalties was not adverse possession of anything. Apparently, the court would have held otherwise had the well been physically located on the tract.

We can only speculate whether the Arkansas court would adopt the *Cornelius* decision. Indeed there is some reason to believe it would not. In *Post v. Tenneco Oil Company*,<sup>24</sup> the Arkansas Supreme Court held that a lessor's entitlement to "free gas" from wells located on the lease premises included off-premises unit wells. In *Post*, the Supreme Court noted that the unit wells produced gas from under the lease premises and that royalties were paid on a unit basis. In an earlier case, *Brizzolara v. Powell*,<sup>25</sup> the Arkansas

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<sup>22</sup> Norvell, ADVERSE POSSESSION AND THE SEVERED MINERAL ESTATE IN ARKANSAS, 39th Annual Natural Resources Law Institute (2000)

<sup>23</sup> 18 P.3d 1081 (Ok. Civ. App. 2001).

<sup>24</sup> 278 Ark. 527, 648 S.W.2d 42 (1983).

<sup>25</sup> 214 Ark. 870, 218 S.W.2d 728 (1949).

Court held that adjoining production under a voluntary pooling agreement did not constitute adverse possession of gas but offered the following dicta:

It is possible that the rule might be different if the neighboring well had been drilled in accordance with a finding in the Oil and Gas Commission that such a well *would* drain surrounding property, necessitating the formation of a drilling unit; but that situation is not presented.<sup>26</sup>

**ARKANSAS COURT OF APPEALS HOLDS THAT USE OF UNDERGROUND  
PIPELINE WITHOUT RELATED SURFACE ACTIVITIES IS NOT  
SUFFICIENTLY ADVERSE TO CREATE A PRESCRIPTIVE EASEMENT**

The Whortons and Needhams are neighbors. An Arkla distribution line crosses the Needhams' property. Many years before either family had acquired their properties, a private gas line was laid from the Arkla line to the house now occupied by the Whortons. The Needhams claimed they were unaware of that line. In 1999, Arkla determined that the gas line to the Whorton house had developed a leak and cut off the gas. The Whortons, claiming a prescriptive easement, tried to go upon the Needhams' property and make repairs. When the Needhams refused, the Whortons sued, claiming they had a prescriptive easement. The Logan County Chancery Judge<sup>27</sup> ruled for the Needhams and the Arkansas Court of Appeals, in an unpublished opinion, affirmed.<sup>28</sup> Mere transmission of gas beneath the surface does not constitute the adverse possession necessary to create a prescriptive easement. Only those activities which would call attention to the easement, such as mowing and maintaining the right-of-way, will suffice.

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<sup>26</sup> *Brizzolara v. Powell*, supra, 214 Ark. at 873.

<sup>27</sup> The Honorable Van B. Taylor.

<sup>28</sup> *Whorton v. Needham*, No. CA 00-773 (Ark. App. 03/07/2001)

**ARKANSAS LEGISLATURE DEFEATS BILL ALLOCATING  
POST-PRODUCTION COSTS WHILE COLORADO DECISION  
DEMONSTRATES WHY SUCH LEGISLATION IS NEEDED**

A landmark case dealing with the deductibility of post-production costs in calculating royalty is *Mittlestaedt v. Santa Fe Minerals, Inc.*,<sup>29</sup> which holds that the lessee has a duty, under its implied covenant to market, to cause gas to become a marketable product, free of any cost to the lessor. Also, it is generally thought that, with or without specific language in leases, the place of sale of gas upon which royalty is based, whether actual or hypothetical, is at the wellhead where it is produced. Thus, any monies spent enhancing the value of marketable gas by treating it, compressing it, and/or moving it to a market where a better price is available may properly be shared, proportionately, with the lessor.

However, because of the uncertainty of Arkansas law on this issue,<sup>30</sup> Arkansas gas industry representatives petitioned the Arkansas legislature to clarify the matter. Fairly late in the 2001 Legislative Session, Senator Mahoney introduced Senate Bill 813, which was designed to statutorily adopt the *Mittlestaedt* doctrine and clarify that reasonable transportation costs for sales away from the wellhead could be deducted, so as to obtain a “net-back” wellhead price for the gas. The bill proved controversial. It finally passed the Senate but was defeated in the House of Representatives.

Meanwhile, out in Denver, the Colorado Supreme Court proved why Senate Bill 813 was so desperately needed. In its case of *Rogers v. Westerman*,<sup>31</sup> the Colorado court got

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<sup>29</sup> 754 P.2d 1203 (Okla. 1998).

<sup>30</sup> Caused, in large part, by *Hanna Oil & Gas Co. v. Taylor*, 297 Ark. 80, 759 S.W.2d 563 (1968).

<sup>31</sup> 29 P.3d. 887 (Colo. 2001).

it about as wrong as it gets. While the court adopted the first marketable product rule of *Mittlestaedt*, it declined to adopt the “at the wellhead” rule, without which the first marketable product rule makes no sense.

Instead, the Colorado court held that the lessee’s duty to make a marketable product included the cost of transporting the gas to a “commercial marketplace.” Worse, the court held that a sale of the gas, regardless of whether it occurred in good faith, did not necessarily establish a commercial market. Rather, that question, as well as the question of when gas becomes a marketable product, is a question of fact to be decided by the jury.

At this point, we should probably note that the sensational *Bridenstine* case<sup>32</sup> was a contort involving excessive post-production charges deducted from royalties. It is certainly imaginable that, under the *Rogers* decision, a producer could sell its produced gas, pay the appropriate fraction of the proceeds to royalty owners, and still be held liable in contort for royalties on the difference between the price gotten and that theoretically available at some better “commercial marketplace.” In the worst case scenario, if contorting is permitted, a runaway jury might even award punitive damages. Senate Bill 813, or something like it, needs to be enacted in the next legislative session.

#### **AOGC IMPLEMENTS MOST OF NEWLY AUTHORIZED INCREASE IN OIL AND GAS CONSERVATION ASSESSMENT**

The AOGC is financed, in large part, by a severance tax known as the conservation assessment. That tax has long been 25 mils (2.5¢) per barrel of oil,<sup>33</sup> 5 mils (.5¢) per MCF

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<sup>32</sup> Discussed *supra*.

<sup>33</sup> A.C.A. § 51-71-107.

of gas<sup>34</sup> and 25¢ per 1,000 barrels of brine.<sup>35</sup> In 2001, the Commission, strapped by increased costs, lobbied the legislature for authority to increase these assessments. The legislature responded favorably, enacting Act No. 1188 of 2001, which increased its authority to tax oil from 25 mills (2.5¢) to 50 mills (5¢) per barrel, gas from 5 mills (.5¢) to 10 mills (1¢) per MCF and brine from 25¢ to 50¢ per 1,000 barrels.

The Commission staff then conducted a comprehensive review of the relative costs of regulating these three industries, versus the conservation assessment paid by each. That review led to the staff's conclusion that the brine industry was already paying at least its share. However, the staff suggested that the AOGC increase the conservation assessments on oil and gas to the maximum amount permitted.

The Commission's anguish was obvious as it discussed the implementation of its increased authority to tax. Indeed, throughout 2001, only one other can contained more worms.<sup>36</sup> Commissioners appeared to be simultaneously pulled three ways: (1) the need for increased revenues was obvious, indeed it was becoming desperate; (2) small South Arkansas gas producers demanded no new taxes, at least none that they would have to pay;<sup>37</sup> (3) North Arkansas gas producers didn't seem to mind the increase but were unwilling to bear more than their proportionate share.

After three separate hearings, the Commission implemented most, but not all, of its

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<sup>34</sup> Id.

<sup>35</sup> A.C.A. § 15-76-306(d).

<sup>36</sup> Ducky Wucky, *infra*.

<sup>37</sup> This is somewhat ironic. These folks and their predecessors have long been responsible for more than their share of regulatory costs.

taxing authority on oil and gas. Effective January 1, 2002, the conservation assessment was increased to 4.3¢ per barrel of oil and .9¢ per MCF of gas. No change was made in the brine assessment.

#### **NEW ARKANSAS LEGISLATION CONFIRMS THAT AOGC MAY EMPLOY PRIVATE COUNSEL**

In a 2000 appeal of a Circuit Court affirmance of a 1999 AOGC integration order,<sup>38</sup> the appellants raised an interesting issue. The original act creating the Commission provided that legal representation would be by the Attorney General or, if he was not available, the prosecuting attorney of any county in which a suit was pending. No mention was made of private outside counsel. Thus, the appellants assigned as error the trial court's refusal to disqualify long-time AOGC counsel William Wynne. The Court of Appeals dodged that bullet, stating that even if the Circuit Judge's ruling was erroneous, it was harmless error since other counsel in the case had made the identical arguments advanced by Mr. Wynne.

This will not be a problem in the future because the Arkansas Legislature enacted Act No. 1189 of 2001 which amended A.C.A. § 15-71-104 to read as follows:

15-71-104. Counsel for the commission.

(a)(1) The Oil and Gas Commission may employ an attorney to provide specialized professional services in matters requiring legal representation.

(2) However, any contract for legal representation shall be subject to approval by the Attorney General, who shall otherwise be attorney for the commission.

(b) Any member of the commission or the secretary thereof shall

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<sup>38</sup> *Lindquist & Moore v. Arkansas Oil and Gas Commission, et al.*, UNPUBLISHED, No. CA 99-1306 (Ark. App. 05/31/2000)

have power to administer oaths to any witness in any hearing, investigation, or proceeding contemplated by this act or by any other law of this state relating to the conservation of oil or gas.

History. Acts 1939, No. 105, § 4; A.S.A. 1947, § 53-104; Acts 2001, No. 1189, § 1.

### **THE WORMS GOT OUT OF THE CAN AGAIN AND DUCKY WUCKY MAY HAVE LEFT THE BUILDING**

The AOGC has a mixed mission. It is supposed to regulate the production of oil and gas to both promote conservation (*i.e.* prevent waste) and protect correlative rights.<sup>39</sup> Unfortunately, these objectives sometimes are in conflict. In the gas business there are at least two commodities worthy of being conserved: gas and money. You can turn money into gas and gas into money. Nevertheless, as we all know, these two currencies are not always fungible with one another. The exchange rate between them is subject to wild fluctuations. Both have a time value. The curves of those time values sometimes run in opposite directions.

These variances occur on a case-by-case basis. Some producers are so cash flow needy that every decrease in the price of gas must be compensated for by an increase in production. At the other extreme are those who look at gas in the ground as money in the bank, only better. In between are those producers who would like to sell more gas (particularly during periods of high prices) or, at least, not sell less gas as their wells deplete.

Of course, correlative rights issues make all of this impossibly complex. Almost every drilling unit is differently owned from units off-setting it. Worse, in many units,

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<sup>39</sup>A.C.A. §§ 15-72-101-102



individual wellbores are owned differently. Against this back-drop, the AOGC has once again been asked to deal with the “I words.”<sup>40</sup>

The last time this happened this author felt compelled to devote an entire paper to the resultant can of worms.<sup>41</sup> You might remember Ducky Wucky.<sup>42</sup> According to the late AOGC chairman, Ned Price, fear of all suggestions of increased density was the equivalent of screaming “the sky is falling” with each dropping acorn. Well, Ducky found relief in late 1995 in the form of an interim legislative committee which ordered the AOGC to stop studying increased density until it (the committee) could look further into the matter. As far as is known that committee never did. Its members have long been lost to term limits. Nevertheless, the committee sent increased density into about a six year coma.

During those six years a couple of interesting things happened. First, as might be expected, the Arkoma Basin became even more mature. It has become harder and harder to find anything new, except in small, hard to find and harder to map reservoirs. Second, for a wonderful eighteen months or so, the price was up. **Way up!** That set off a wave of exploration in the south part of the Basin, which is much deeper structurally than the “Fairway” along the Arkansas River.

The geology of this South Flank area is somewhat different from the Fairway. The

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<sup>40</sup> Increased well density.

<sup>41</sup>Daily, INCREASED DENSITY FOR ARKANSAS OR YOU CAN'T KEEP A GOOD WORM DOWN IN THE CAN, 34<sup>th</sup> Annual Natural Resources Law Institute (1995).

<sup>42</sup>Wucky, a/k/a Lucky, was one of several barnyard residents led into mass panic by Chicken Little in the children's story named for the latter fowl. Little, a creature of limited experience, had confused a falling acorn with Armageddon. In at least some versions of the story, Little, Wucky and their companions were eaten by one Foxy Loxy, a/k/a Woxy, which may explain Wucky's recent absence from the scene.

productive sandstones are Middle Atokan. They are deep water turbidites rather than deltaic shelf deposits. The communication throughout these strata is tortuous, at best. Also, permeability is frequently poor. Finally, the proximity of the South Flank to the upthrust Ouachita Mountain Range causes these Middle Atoka reservoirs to be busted up with numerous thrust faults. Middle Atoka structure and isopach maps look like scrambled eggs.

In recognition of these geologic distinctions the AOGC has begun to recognize that South Flank units may need different well density rules. This has been done, case-by-case, in one of three ways:

**1. Make it easier to establish separation.** Existing rules do not prohibit second and subsequent wells within units. They prohibit multiple wells within the same “common source of supply” within any single unit. Thus, there can always be as many wells as there are geologic formations producing within the unit and, if one of those is interrupted by a barrier, such as a fault, as many more wells as there are barriers. The only trouble is that you have to prove the separation of the reservoir after spending the money to drill your well. In two South Flank fields, Chismville and Booneville, the AOGC has agreed that one Middle Atoka reservoir, the Upper Borum, is so irregularly deposited and fractured that each new well completed in that formation is presumed to be in a separate common source of supply from any other Upper Borum wells within the unit.<sup>43</sup>

**2. Reduce the size of the box.** Almost all Arkoma Basin units are 640 acre regular governmental sections. However, in two instances, the AOGC has somewhat reluctantly

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<sup>43</sup> AOGC Order Reference Nos. 93-94 and 86-2001-05, respectively.

agreed to the creation of sub-units within existing units for Middle Atoka wells. In the first of these Howard Bagby convinced the Commission to downsize one unit within the Chismville Field to 80 acre sub-units.<sup>44</sup> The downsizing order applies only to two Middle Atoka formations.<sup>45</sup> To honor the vested rights of royalty owners all royalties from all sub-unit wells continue to be paid across the original 676.71 acre unit.

The second successful downsizing did not occur until October 2001. That was a rehearing of the previously stalemated application of Vastar Resources, Inc., to reduce unit size for a formation called the "Upper Hartford 'A'" in Mansfield Field to 160 acres. Again, the proposal was to create sub-units and continue to pay royalties based upon the original units of approximately 640 acres.<sup>46</sup>

That application proved extremely controversial. It was first heard in September with Commissioners Weiser and Carmel absent. At the end of that day there was a tie vote, Commissioner White abstaining. Vastar requested a rehearing. That time, with all Commissioners participating, it passed, but by only one vote, and was significantly limited in scope.<sup>47</sup>

**3. Stripper Wells Should Not Count.** Dorsey Ryan has long cried for an exception to what he calls the "rule of one." That exception would classify marginal wells as "stripper" wells and permit them to produce without preempting the unit allowable for their productive

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<sup>44</sup> The unit is Section 7, Township 6 North, Range 27 West, Logan County. The case is AOGC Order Reference No. 53-95.

<sup>45</sup> Basham (970' to 1,605') and Nichols (1,605' to 2,400').

<sup>46</sup> AOGC Order Reference No. 163-2001-10.

<sup>47</sup> One year or 10 wells, whichever comes first.

reservoirs. Dorsey has filed such an application at lease twice before on behalf of Hanna Oil and Gas Company. In February, 2002, Dorsey filed another such application, this time for Hanna and five other companies.<sup>48</sup> The application defines a “stripper” well as a well incapable of producing in excess of 60 MCF per day, whose production cannot reasonably be improved. It requests that the stripper be permitted to produce without affecting the unit production allowable for any other unit well.

Dorsey’s current application is very much like the ones which have failed in the past, with one important exception. The latest application is limited to the South Flank of the Basin.<sup>49</sup> As of the publication date for this paper no opposition<sup>50</sup> had surfaced. The application is scheduled to be heard the day before this paper is scheduled to be presented. It should be interesting.

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<sup>48</sup> Hogback Exploration, Inc., Klabzuba Oil & Gas, Providence Exploration & Production, Inc., Freedom Energy Inc. and XTO Energy, Inc.

<sup>49</sup> Chismville, Gragg, Slaytonville, Booneville, Brock Creek, Delaware, Excelsior, Fletcher Creek, Mansfield, Pine Ridge, Waveland and Witcherville Fields.

<sup>50</sup> Ducky Wucky or otherwise.